88-834

No. _____

Supreme Court, U.S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1988

STATE OF CONNECTICUT,
Petitioner,

v.

GALEN PLOURDE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT WITH ATTACHED APPENDIX

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QUESTION PRESENTED

Does *Doyle v. Ohio*, 426 U.S. 610 (1976), bar the prosecution's use of a suspect's post-*Miranda*, pre-arrest silence when: (1) the suspect had earlier received *Miranda* warnings in the context of a custodial search; (2) custody has ended and the suspect knows he is free to leave; (3) the suspect has voluntarily remained in the presence of police; and (4) he states that he "would sit and listen and [the police] could talk"?

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STATE OF CONNECTICUT,
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GALEN PLOURDE,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner respectfully requests that a writ of certiorari be granted to review the decision and judgment of the Connecticut Supreme Court, entered on August 2, 1988, which reversed the respondent's conviction. That court denied the petitioner's motion for reargument and/or reconsideration on September 20, 1988.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court, reported at 208 Conn. 455, ____ A.2d ____ (1988), is attached hereto in the Appendix. The Connecticut Supreme Court's order, denying the state's motion for reargument and/or reconsideration, and the Chief Justice's denial of the state's request for reargument *en banc*, are also included in the Appendix.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on August 2, 1988. The petitioner's motion for reargument and/or reconsideration was denied on September 20, 1988. This Court has jurisdiction to review the judgment of the Connecticut Supreme Court by writ of certiorari pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULE 17.1

Revised Rules of the Supreme Court of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

On November 5, 1985, following a trial by jury of twelve, the respondent, charged with the murder of his wife, was convicted of one count of murder, in violation of Connecticut General Statutes § 53a-54a(a). On December 16, 1985, he was sentenced to a term of imprisonment of forty years.

The dispositive issue on the respondent's appeal to the Connecticut Supreme Court was his claim that the state's use of his silence during a noncustodial police interview violated the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976). Despite the respondent's failure to raise the *Doyle* claim at trial, either by way of a motion to suppress or an objection to the implicated testimony, the Connecticut Supreme Court found the record adequate for review, and reached the merits of the *Doyle* issue. The Court concluded that the following scenario had occurred:

> . . . According to [Detective] Bates' testimony, on that morning [December 18, 1983] he went to the defendant's house in order to execute a search and seizure warrant upon his person. After explaining the purpose of the warrant, Bates informed the defendant that he was not under arrest but that he was required to comply with the execution of the warrant and that when it was completed he would be free to go. Bates read the *Miranda* rights to the defendant from a preprinted form and then asked the defendant to read the form aloud initialing each right to indicate his comprehension. The defendant complied with the request. Where the caption "WAIVER" appeared in the middle of the form he crossed out the word and inserted the phrase "understanding of rights." He then placed his initials next to each sentence on the form except for the last sentence, which stated: "I am willing to answer questions and make a statement knowing that I have these rights, I do not want a lawyer. I know and understand what I am doing. I do

this freely and voluntarily and no threats or promises have been made to me." Lastly, he signed the bottom of the form.

Thereafter, Bates drove with the defendant to police barracks in Hartford for the execution of the warrant. After the search procedures had been completed, Bates informed the defendant that he was free to leave and offered him a ride home. When Bates then asked if the defendant would be willing to stay and talk with the police, the defendant responded that "he would sit and listen and [the police] could talk." For the next twenty or so minutes, the police detailed the evidence linking the defendant to the crime. Bates testified that, as the defendant listened, he "became visibly shaken. His eyes began to redden. I could see tears welling up in his eyes and I could see him actually shaking." Eventually, the defendant indicated that "he would give a statement, but that he wanted to call his lawyer to see if he could get the best deal." He was then allowed to call his lawyer who arrived to pick him up an hour later.

We conclude that this record is adequate for the purposes of reviewing the defendant's *Doyle* claim. Bates' testimony that the defendant read, corrected and initialed the Waiver of Rights form demonstrates that the defendant received and understood the *Miranda* warnings. Notwithstanding the state's contention to the contrary,* the defendant's statement that he would "sit and listen" and his subsequent silence during the police recitation clearly demonstrated his intent to invoke his right to remain silent. [citation omitted]. His assertion of his intention to make a statement in the future, after consultation with his attorney, was a further indication of his intent during the interview to remain silent and was inextricably intertwined with it.

* The state attempts to characterize the defendant's decision to remain at the barracks to hear the evidence the police had against him as "a waiver" of his right to be silent. The defendant may have chosen, however, to remain at the barracks in the reasonable belief, based on the *Miranda* warnings he had received earlier, that he could invoke his right to be silent without incurring any penalties.

Appendix, 208 Conn. at 464-5.[1]

The court rejected the defendant's claim that he was in custody after the search warrant procedures were completed. Appendix, 208 Conn. at 466-7. Despite this finding that the defendant was not in custody, the court stated:

> We are nevertheless persuaded that the defendant's invocation of the right to be silent was not admissible. "*Doyle* and subsequent cases have . . . made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires." *Wainwright v. Greenfield*, [474 U.S. 284], 291 [(1986)]; *see Greer v. Miller*, 483 U.S. , 107 S.Ct. 3102, 3107-3108, 97 L.Ed.2d 618 (1987). The unfairness of using a defendant's silence following *Miranda* warnings is not mitigated by the absence of custody. "*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him . . . . *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances."

[1] The petitioner had also contended in its brief and at oral argument that the respondent's acquiescence to the police request for an interview was not an invocation of the right to remain silent, but rather a consent or invitation to police interrogation.

Wainwright v. Greenfield, supra, 291; *Fletcher v. Weir*, [455 U.S. 603], 606 [(1982)]; *Anderson v. Charles*, 447 U.S. 404, 407–408, 100 S.Ct. 2180, 65 L.Ed.2d 222, reh. denied, 448 U.S. 912, 101 S.Ct. 27, 65 L.Ed.2d 1173 (1980). Custody is therefore not a prerequisite to a *Doyle* violation. [footnote omitted]

In this case, the police administered *Miranda* warnings to the defendant prior to taking him into custody to execute the search and seizure warrant. Nothing in the words or conduct of the police after the search had been completed indicated that the assurances implicit in the *Miranda* warnings were no longer in force. Under the circumstances, the defendant could have invoked his right to remain silent in the reasonable belief that the state would not thereafter use that silence against him. The record does not indicate that the defendant spoke during the police recitation except to invoke his rights to remain silent and to a lawyer. Thus, this is not a case in which the defendant was selectively silent. [citations omitted]. In this context, use of the defendant's silence as affirmative proof at trial was "fundamentally unfair and a deprivation of due process." *Doyle v. Ohio, supra*, 618. [footnote omitted]

Appendix, 208 Conn. at 467–8.

The court then concluded that the perceived *Doyle* violation was not harmless beyond a reasonable doubt. 208 Conn. at 468–9.

REASONS FOR GRANTING THE PETITION

THE CONNECTICUT SUPREME COURT'S EXTENSION OF THE *DOYLE* RULE TO BAR THE USE OF RESPONDENT'S POST-*MIRANDA*, PRE-ARREST SILENCE CONFLICTS WITH THE RATIONALE OF *DOYLE*.

Due process prohibits the prosecution's use of a defendant's silence, after he has been taken into custody and received the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), to impeach a defendant's exculpatory story told for the first time at his trial. *Doyle v. Ohio*, 426 U.S. 610 (1976) (hereinafter *Doyle*). Post-arrest silence may not be particularly probative of guilt, and the *Miranda* warnings convey an implicit promise that silence will carry no penalty. *Id.* at 617. Thus, an arrestee's silence in the wake of *Miranda* warnings may be deemed "insolubly ambiguous." *Id.*

In the years since *Doyle* was decided, this Court has considered the applicability of the *Doyle* rule in a variety of contexts. In *Jenkins v. Anderson*, 447 U.S. 231 (1980), this Court held that neither the privilege against compelled self-incrimination nor the right to due process are implicated when the prosecution uses a defendant's pre-arrest, pre-*Miranda* silence to impeach him at trial. In *Fletcher v. Weir*, 455 U.S. 603 (1982), this Court decided that *Doyle* did not bar the use of a defendant's post-arrest, pre-*Miranda* silence. In *Wainwright v. Greenfield*, 474 U.S. 284 (1986), this Court held that *Doyle* precluded the use of a defendant's post-arrest, post-*Miranda* silence to overcome his plea of insanity. And in *Greer v. Miller*, ____ U.S. ____, 107 S.Ct. 3102 (1987), the Court found no *Doyle* violation had occurred where the trial court sustained an objection to the prosecutor's question about the defendant's post-arrest, post-*Miranda* silence, and specifically instructed the jury to disregard the question. All of these cases either expressly or implicitly reiterated and adhered to the two prerequisites for the finding of a *Doyle* violation: custody and *Miranda* warnings.

Doyle buttresses *Miranda*'s protection against compulsory self-incrimination in the custodial context. "*Doyle* is therefore a prophylactic rule designed to increase the efficacy of another prophylactic rule." *Phelps v. Duckworth*, 772 F.2d 1410, 1422 (7th Cir.) (Easterbrook, J., concurring), *cert. denied*, 474 U.S. 1011 (1985).[2]

Because the rules set forth in *Miranda* and *Doyle* are prophylactic protections for the privilege against self-incrimination, they are inapplicable where that constitutional right has not yet been triggered, and consequently they have no application unless an individual is subjected to interrogation in a custodial or otherwise inherently coercive environment. *See Edwards v. Arizona*, 451 U.S. 477, 484-5 (1981) (when custodial suspect invokes right to counsel, interrogation must cease); *Jenkins v. Anderson*, *supra*, at 238-40 (*Doyle* inapplicable to bar impeachment use of pre-arrest, pre-*Miranda* silence); *Rhode Island v. Innis*, 446 U.S. 291, 298-99 (1980) (*Miranda* concerned with effect of coercive environment created by interplay between custody and interrogation); *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977) (per curiam) (*Miranda* applies only when individual subjected to custodial interrogation); *Beckwith v. United States*, 425 U.S. 341, 344 (1976) (same); *Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988) (no *Edwards* violation where break in custody dissipated interrogated defendant's request for counsel, so subsequent confession admissible) (citing cases); *Davis v. Allsbrooks*, 778 F.2d 168, 170 (4th Cir. 1985) (where police gave *Miranda* warnings to suspect not in custody, no *Miranda* violation when police continued to question him in noncoercive manner after he indicated desire to stop dialogue).

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[2] The seed of the *Doyle* rule was germinated in the *Miranda* decision itself, where this Court said, "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Miranda v. Arizona*, *supra*, at 468 n.37.

In the present case, the Connecticut Supreme Court has extended *Doyle* to bar the use of a defendant's post-*Miranda*, pre-arrest silence, a permutation of *Doyle* not yet addressed by this Court. The holding of the Connecticut Supreme Court, that "[c]ustody is . . . not a prerequisite to a *Doyle* violation"; Appendix, 208 Conn. at 467; directly conflicts with *Doyle* and its progeny, because it dispenses with one of the two prerequisites for a *Doyle* violation, and it expands the scope of *Doyle*'s applicability to noncustodial situations.

When the Connecticut Supreme Court dispensed with custody as a prerequisite for a *Doyle* violation, it completely disregarded *Doyle*'s role in maintaining the subtle balance which *Miranda* achieved by giving a custodial defendant some control over the course of interrogation, while recognizing the legitimacy of police questioning as a tool of law enforcement. *Miranda v. Arizona*, *supra*, at 467–70, 477–8. The court imposed greater restrictions as a matter of federal constitutional law than this Court has deemed necessary. *See Fare v. Michael C.*, 442 U.S. 707, 717 (1979); *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Where *Miranda* principles are not at stake, the need for *Doyle* to buttress those principles is nonexistent. The only relevant constitutional consideration in such pre-arrest circumstances is the voluntariness of the respondent's participation in the interview, *see Colorado v. Connelly*, 479 U.S. 157 (1986) (voluntariness depends on absence of police overreaching); *Miranda*, *supra*, at 456, 478 (voluntary statement free of compelling influences not barred from evidence), an issue which was not challenged by the petitioner in this case.

The significance of custody in triggering prophylactic safeguards cannot be relegated to a position of insignificance. *See Beckwith v. United States*, *supra*, at 346 (*Miranda* "grounded squarely in the Court's explicit and detailed assessment of the peculiar nature and setting of" custodial interrogation); *Jenkins v. Anderson*, *supra*, at 236 n.2 (use of pre-arrest silence for impeachment purposes permissible even if that silence held to be invocation of privilege against self-

incrimination). In *Jenkins* this Court considered the possibility that a noncustodial suspect may not remain silent if his failure to speak can later be used to impeach him at trial. In refusing to extend constitutional protection to that circumstance, this Court said,

> [T]he constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." . . . The "threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." . . . The . . . Court [in *Raffel v. United States*, 271 U.S. 494 (1926)] explicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights.

447 U.S. at 236–7 (citations omitted).[3]

"Balance is essential when the Court fashions rules which are preventative and do not themselves stem from violations of a constitutional right." *Arizona v. Roberson*, ____ U.S. ____, 108 S.Ct. 2093, 2103 (1988) (Kennedy, J., dissenting); *see Michigan v. Tucker*, 417 U.S. 433, 443–5 (1974) (failure to adhere to literal requirements of *Miranda* does not, in absence of coercion, breach right against self-incrimination). Surely *Doyle*, a "prophylactic rule designed to increase the efficacy of another prophylactic rule [*Miranda*]"; *Phelps v. Duckworth*, *supra*; ought not be cut free from its moorings in the custodial environment, at least not without the provision of an alternate harbor. *See Beckwith v. United States*, *supra*, at 346

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[3] Thus, even if the Connecticut Supreme Court were correct in finding that the defendant had invoked his privilege against compelled self-incrimination at the noncustodial interview, a finding that the petitioner does not concede, that invocation did not as a matter of federal constitutional law preclude the use of the defendant's silence at trial. The admissibility of such silence is solely a matter of state evidentiary law. *Jenkins v. Anderson*, *supra*, at 240–1.

(extension of *Miranda* to noncustodial situations "would cut . . . holding in that case completely loose from its own explicitly stated rationale").

In finding that custody was not a prerequisite to application of the *Doyle* rule, the Connecticut Supreme Court relied on language in *Wainwright v. Greenfield, supra*, which emphasizes *Miranda*'s implicit assurance that a suspect's silence will not be used against him. Appendix, 208 Conn. at 467. Despite the court's recognition that *Greenfield* involved a custodial interrogation of an arrested person, the court reasoned that *Greenfield* found *Miranda* warnings to be the sole prerequisite for application of the *Doyle* rule. *Id.* at 466, 467.

Greenfield does not provide support for the proposition that custody is not a prerequisite to application of the *Doyle* rule. In *Greenfield* this Court reaffirmed the significance of arrest in the constitutional underpinnings of *Doyle* by saying, "The critical importance of the implied promise that is conveyed *to an arrested person* by the *Miranda* warnings has been repeatedly confirmed in subsequent decisions [after *Doyle*]." 474 U.S. at 290 (emphasis added). This Court also said, "The point of the *Doyle* holding is that it is fundamentally unfair to promise *an arrested person* that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." 474 U.S. at 292 (emphasis added).[4]

The respondent was not advised of *Miranda* warnings at the inception of the noncustodial police interview. The state court's emphasis on the defendant's *Miranda* advisement during the earlier custodial search as a basis for its application of the *Doyle* rule is misplaced. The assurances embodied in

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[4] *Greenfield* also refers to the elements of *Doyle* as "the constitutional dimension and the implied assurance [that silence will not be used]." 474 U.S. at 293. By "the constitutional dimension" the Court was most likely referring to the fact of custody which triggers the constitutional concerns addressed by *Miranda*.

the *Miranda* warnings to not carry over, with constitutional force, to events in the post-custodial context. *See Dunkins v. Thigpen, supra; Davis v. Allsbrooks, supra.*[5]

Three other courts of last resort have considered and decided the constitutionality of the use of a defendant's post-*Miranda*, pre-arrest silence.[6] The courts in *State v. Fencl*, 109 Wisc.2d 224 (1982), and *Fencl v. Abrahamson*, 841 F.2d 760 (7th Cir. 1988), the federal habeas decision arising from *State v. Fencl*, found a *Doyle* error in the absence of custody, but determined that the error was harmless. In *State v. Robinson*, 496 A.2d 1067 (Me. 1985), the Maine Supreme Court refused to apply *Doyle* in the absence of custody.

The skewed interpretation of *Doyle* employed by the Connecticut Supreme Court is representative of an incipient trend. *See State v. Fencl, supra; Fencl v. Abrahamson, supra.* This Court should grant the writ to correct the erroneous application of *Doyle* to noncustodial situations, which is beginning to proliferate in the lower courts.

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[5] The respondent made no claim that the use of his silence violated any other aspect of due process, such as the right to a fair trial or prosecutorial misconduct, nor did the Connecticut Supreme Court consider any. *See Greer v. Miller, supra*, at 3109. Therefore this Court need not consider whether other constitutional questions may be engendered by the facts of this case.

[6] In an earlier case, the Connecticut Supreme Court had declined to extend the *Doyle* rule to noncustodial silence, holding that even if error had occurred, it was harmless; and this Court subsequently denied the defendant's petition for certification. *State v. Shashaty*, 205 Conn. 39, 529 A.2d 1308 (1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 753 (1988).

CONCLUSION

The opinion of the Connecticut Supreme Court ignored the foregoing principles and case law, and thus it erred in extending *Doyle* to noncustodial silence. The petition should be granted.

Respectfully submitted,

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APPENDIX

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Denial of Request for Reargument *En Banc* 20A

STATE OF CONNECTICUT *v.* GALEN PLOURDE (12918)

PETERS, C. J., HEALEY, SHEA, GLASS and HULL, Js.

Convicted of the crime of murder in connection with the death of his wife, the defendant appealed to this court. *Held:*

1. The evidence presented, when taken together, was sufficient to allow the jury reasonably to find him guilty beyond a reasonable doubt.
2. The trial court erred in admitting evidence of the defendant's invocation of his right to remain silent following his receipt of *Miranda* warnings despite the fact that he was not in custody at that time, and, since the state's case was based exclusively on circumstantial evidence, there was a reasonable possibility that this improperly admitted evidence contributed to his conviction; accordingly, the judgment of conviction was set aside and the case was remanded for a new trial.
3. The defendant could not prevail on his claim that the exclusion of evidence of his willingness to take a lie detector test impaired his right to confrontation in that it did not permit him to impeach testimony that he was disinclined to cooperate with the police; because of its minimal probative value, that evidence did not significantly implicate the reliability of the testimony that he sought to impeach.

Argued June 2—decision released August 2, 1988

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before *Byrne, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Error; new trial.*

C. Douglas Nash, assistant public defender, with whom, on the brief, was *Joette Katz*, public defender, for the appellant (defendant).

Judith Rossi, deputy assistant state's attorney, with whom, on the brief, were *Timothy Liston*, assistant state's attorney, and *Jack W. Fischer*, legal intern, for the appellee (state).

PETERS, C. J. The dispositive issue in this appeal is whether the admission into evidence of the defendant's

silence following his receipt of *Miranda* warnings violated his right to due process of law. A jury found the defendant, Galen Plourde, guilty of murder in violation of General Statutes § 53a-54a (a).[1] He appeals from the judgment sentencing him to forty years imprisonment. We find error and remand for a new trial.

On the morning of December 16, 1983, the body of the victim, Ada Plourde, was found in her automobile, which was parked in the parking lot of My Brother's Place Cafe in Cromwell. The state's theory of the case was as follows: On the evening of Thursday, December 15, the victim left her husband, the defendant, and their two young daughters at home in Berlin to attend a data processing class at Avon High School. Following her usual practice, she drove to the house of a friend, Bernice Prusacyk, in Farmington. The two of them then drove together to the class. Since the final exam was scheduled for that evening, class let out earlier than usual. After doing some Christmas shopping, Prusacyk and the victim went to Chuck's Restaurant in Farmington for drinks and chips. The two returned to Prusacyk's home by 11 p.m. and the victim departed. When she returned home, the victim and the defendant became involved in an argument. During an ensuing physical struggle, the defendant strangled the victim to death. The defendant placed the victim's body and the bags containing her purchases in her car. He then removed the victim's jewelry and tore up the shopping bags to create the appearance of a robbery. He drove the car to the parking lot of My Brother's Place Cafe, which was located about a mile from his house. After walking home, he made several phone calls to the police reporting his wife's absence

[1] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception."

in order to establish an alibi. To suggest a possible motive, the state presented evidence that the defendant and the victim had had marital difficulties and that the defendant had become involved with another woman.

On appeal, the defendant claims that the trial court erred in: (1) denying his motion for acquittal based on the insufficiency of the evidence; (2) admitting his post-*Miranda* silence on December 17 and on December 18 into evidence and instructing the jury to use that silence to infer guilt; (3) admitting his post-*Miranda* statements and conduct; and (4) suppressing evidence of the defendant's willingness to take a polygraph test.[2] We agree with the defendant that the court erred in admitting his post-*Miranda* silence of December 18 and accordingly remand for a new trial.

I

Because success on his insufficiency of the evidence claim would entirely shield the defendant from further criminal proceedings; *State* v. *Pellegrino*, 194 Conn. 279, 294, 480 A.2d 537 (1984); we turn to this issue first. At the close of the state's evidence and again at the close of all the evidence, the defendant filed motions for acquittal, both of which the trial court denied. On appeal, the defendant renews his claim that there was insufficient evidence to establish his identity as the killer. In particular, he argues that the evidence failed to show that the victim returned home on the evening in question. He also assails the other evidence produced

[2] The defendant argues in addition that the trial court erred in: (1) giving the jury an instruction on the inference to be drawn from the victim's statement to Prusacyk that she was going home when no such statement was in evidence; (2) denying the defendant's motion for mistrial after the jury became deadlocked; and (3) charging the jury in its supplemental instruction with regard to the intent necessary to find murder. As these remaining claims may not arise in the course of a new trial, we decline to consider them at this juncture.

to establish his guilt. We are not persuaded that the evidence was insufficient to support his conviction.

Review of the defendant's claim of insufficiency requires us to undertake a two part inquiry: " 'We first review the evidence presented at the trial, construing it in the light most favorable to sustaining the jury's verdict. We then determine whether, upon the facts thus established and the inferences reasonably drawn therefrom, the jury could reasonably have concluded that the cumulative effect of the evidence established guilt beyond a reasonable doubt . . . . In this process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct.' " *State* v. *Rollinson,* 203 Conn. 641, 665-66, 526 A.2d 1283 (1987), quoting *State* v. *Sinclair,* 197 Conn. 574, 576, 500 A.2d 539 (1985).

The state produced the following evidence to establish that the victim had returned home after leaving Prusacyk's house: Prusacyk testified that it was the victim's habit to go directly home after she left Prusacyk's home on Thursday nights. On the evening in question, the two became tired and decided to go home early because they were not enjoying themselves.[3] In addition, Heather Plourde, who at the time of her mother's death was seven years old, testified that, subsequent to the murder, she had told the police that late that Thursday night, she had come downstairs, found her mother asleep on the couch and kissed her good-night. She added, however, that she had gotten her "days mixed up." On cross-examination, she testified that she had arisen that night to go to the bathroom but had not gone downstairs and that her statement to the police had been mistaken. Under the circumstances, the

[3] Given this testimony, the fact that Prusacyk failed to testify that the victim said she was going home is of little import.

jury could have believed that the later version of the events represented Heather Plourde's attempt to exculpate her father. Accordingly, the jury could reasonably have credited the first version given to the police.[4] On the basis of Prusacyk's and Heather Plourde's testimony the jury could reasonably have found that the victim had returned home the night of her death.

The state lent further support to its case against the defendant by its introduction of evidence of multiple cuts on his face and torso, which it claimed were a result of his physical struggle with the victim. Ronald Cornell, a Cromwell police officer, testified that during a phone conversation on December 16, the defendant had volunteered that while taking out the trash the prior evening he had received a cut on his lip from some wood protruding from a barrel. The following day, when Cornell picked up the defendant to drive him to the morgue for identification of the victim, he noticed the cut on the defendant's lip. Charles MacIntyre, a state police detective, testified that, during the subsequent interview, he had also observed the cut on the defendant's lip as well as scratches on the defendant's neck. At this time, the defendant, contradicting his previous statement to Cornell, explained that the scratch on his lip had occurred on Wednesday, December 14, while he was moving around some trash barrels. During the interview, the defendant stated that he had received the scratches on his torso the same day when an aluminum ladder had fallen on him in the garage. To discredit the defendant's explanations of the scratches, the state introduced evidence that coworkers who had

[4] The defendant attempts to discredit Heather Plourde's testimony on the basis of records not in evidence. Our review here is limited, however, to whether the jury's verdict had a reasonable basis in the evidence before it. Statements that the defendant failed to introduce at trial have no bearing on our inquiry. The defendant also argues that Heather Plourde's prior statement to the police was not admissible at trial as substantive evidence. Having failed to raise this issue below, he is precluded from raising it here.

been with the defendant on Thursday, December 15, had not noticed any cuts on his face and that no traces of blood had been found on the ladder. Although the defendant presented both lay and expert testimony to the contrary,[5] the jury was free to disregard this testimony and could reasonably have found that the scratches resulted from a fight between the defendant and the victim.

The state's proof also emphasized the defendant's behavior and statements during the police interviews. According to MacIntyre's testimony, at one point in their conversation, the defendant indicated that his wife had scratched him while they had been making love. When asked to display the scratch, he pulled aside his sweater and shirt and began to scratch himself until told to stop. Later during the same interview, MacIntyre informed the defendant that he believed the defendant had killed his wife. The defendant did not deny the accusation and after further discussions indicated that he wanted to speak to a lawyer. The defendant's claim to the contrary notwithstanding, we conclude that the jury could reasonably have viewed this evidence as supporting the defendant's guilt.

The state introduced the results of forensic tests that were consistent with the defendant's guilt. Examination of a green fiber found on the victim's lip revealed microscopic characteristics very similar to a doily from the top of a table in the victim's house. Serological exams of the victim's blood indicated that the victim had type B blood and was a secretor, meaning that B and H antigens could be detected in her body fluids. The defendant had type A blood and was a nonsecretor. Blood discovered on the defendant's watch band

[5] The defendant's daughter Gail testified that she had seen the sticks protruding from the barrel and had told her father that they were a safety hazard. An expert witness testified that it was highly unlikely that the scratches, due to their pattern, had been produced by fingernails.

contained A, B and H antigens. Blood smears found under the armrest in the victim's car and on a sales slip found in the back seat likewise contained all three antigens. Even though other explanations of these results might have been plausible, the jury could reasonably have credited the state's interpretation, that the smears represented a mixture of the victim's and the defendant's blood.[6]

Finally, the state presented evidence to suggest a possible motive. Several witnesses testified to earlier marriage difficulties between the defendant and the victim. In addition, Regina Rentz testified that the defendant had called her several times at work the week of December 12, 1983. According to her testimony, the defendant and she began to see each other four months after the victim's death.

From our review of this record, we conclude that, while not overwhelming, the evidence, when taken together, was sufficient to allow the jury reasonably to find the defendant guilty beyond a reasonable doubt.[7] The jury could have believed, on the basis of the testimony of Prusacyk and Heather Plourde, that the victim returned home the night of December 14. It could also have found that the scratches on the defendant, his subsequent conduct and the results of the forensic examinations further corroborated the state's theory. The defendant's insufficiency claim must accordingly fail.

[6] In addition, evidence of traces of type B blood on the victim's house key but not on the other keys attached to her keyring suggested that type B blood had rubbed off on the key and had dried before the key came in contact with the other keys.

[7] The autopsy revealed the presence of partially digested potato skins in the victim's stomach, which were unaccounted for in the state's version of the events and which, according to the defendant, proved that the victim had not returned home the evening in question. In addition, an expert comparison of soil found on the victim's slacks and a soil sample from the victim's yard revealed that the soil on the slacks had not come from that portion of soil in the yard. Given the other evidence, however, the jury was free not to assign particular weight to this evidence.

II

The defendant's principal claim is that the trial court's admission into evidence of his silence and request for a lawyer following his receipt of *Miranda* warnings violated his due process rights as guaranteed by the fourteenth amendment to the United States constitution. *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). This claim concerns two separate conversations between the defendant and the police, one with MacIntyre at the morgue on December 17, and another the next day with David Bates, a state police detective, at the barracks in Hartford. We decline to review the admissibility of the first of these conversations, but we conclude that the second should have been suppressed.

Initially, we note that the defendant failed to raise this claim at trial either by way of objection or motion to suppress. While we do not generally entertain claims not raised below, we have recognized an exception "where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." *State* v. *Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973). Accordingly, we must consider the record to determine whether it is adequate for the purpose of our review.

The defendant's first complaint of a *Doyle* violation concerns the introduction into evidence of his silence in response to police accusations on the occasion of his conversation with MacIntyre at the morgue on December 17. Cornell testified that, on the previous day, the defendant had made a statement that Cornell transcribed on sheets of paper at the top of which *Miranda* warnings were printed. The defendant read the statement over several times and signed the bottom of each page. MacIntyre testified that, during the interview the

next day, when he accused the defendant of having killed his wife, the defendant "did not deny" it. After "further discussions," the defendant terminated the interview by requesting to talk to a lawyer. The defendant argues on appeal that the trial court's admission of this portion of MacIntyre's testimony violated due process because it breached the assurance implicit in the printed *Miranda* warnings he had received on December 16 that his silence would not be used against him.

We deem this record insufficient to review the defendant's claim. Our conclusion is primarily based on the absence of evidence that the defendant actually read and therefore received the *Miranda* warnings. The defendant urges us to infer that he read the preprinted warnings from Cornell's testimony that the defendant had reviewed his statement several times. There is no testimony, however, to indicate that the defendant read the warnings themselves. In addition, there is no evidence that, during the interview the following day, the defendant was invoking his right to silence in response to MacIntyre's charge. MacIntyre's statement that the defendant "did not deny" the accusation can reasonably be interpreted to mean that the defendant did, in fact, respond, but that his response did not constitute a denial of the charge. We therefore decline to review the defendant's claim that admission of this testimony violated due process. See *State* v. *Leecan*, 198 Conn. 517, 524, 504 A.2d 480, cert. denied, 476 U.S. 1184, 106 S. Ct. 2922, 91 L. Ed. 2d 550 (1986).[8]

[8] The defendant alternatively invokes the second *Evans* exception, under which we will review newly raised claims involving "a new constitutional right not readily forseeable [that] has arisen between the time of trial and appeal." *State* v. *Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973). Our conclusion that the record is deficient for the purposes of review under the first *Evans* exception, however, precludes our review under this exception as well.

The defendant's second *Doyle* challenge concerns the trial court's admission of his statements and conduct during an interview with the police on December 18. According to Bates' testimony, on that morning he went to the defendant's house in order to execute a search and seizure warrant upon his person. After explaining the purpose of the warrant, Bates informed the defendant that he was not under arrest but that he was required to comply with the execution of the warrant and that when it was completed he would be free to go. Bates read the *Miranda* rights to the defendant from a preprinted form and then asked the defendant to read the form aloud initialing each right to indicate his comprehension. The defendant complied with the request. Where the caption "WAIVER" appeared in the middle of the form he crossed out the word and inserted the phrase "understanding of rights." He then placed his initials next to each sentence on the form except for the last sentence, which stated: "I am willing to answer questions and make a statement knowing that I have these rights, I do not want a lawyer. I know and understand what I am doing. I do this freely and voluntarily and no threats or promises have been made to me." Lastly, he signed the bottom of the form.

Thereafter, Bates drove with the defendant to police barracks in Hartford for the execution of the warrant. After the search procedures had been completed, Bates informed the defendant that he was free to leave and offered him a ride home. When Bates then asked if the defendant would be willing to stay and talk with the police, the defendant responded that "he would sit and listen and [the police] could talk." For the next twenty or so minutes, the police detailed the evidence linking the defendant to the crime. Bates testified that, as the defendant listened, he "became visibly shaken. His eyes began to redden. I could see tears welling up in his eyes

and I could see him actually shaking." Eventually, the defendant indicated that "he would give a statement, but that he wanted to call his lawyer to see if he could get the best deal." He was then allowed to call his lawyer who arrived to pick him up an hour later.

We conclude that this record is adequate for the purposes of reviewing the defendant's *Doyle* claim. Bates' testimony that the defendant read, corrected and initialed the Waiver of Rights form demonstrates that the defendant received and understood the *Miranda* warnings. Notwithstanding the state's contention to the contrary,[9] the defendant's statement that he would "sit and listen" and his subsequent silence during the police recitation clearly demonstrated his intent to invoke his right to remain silent. See *State* v. *Pellegrino*, supra, 290–93. His assertion of his intention to make a statement in the future, after consultation with his attorney, was a further indication of his intent during the interview to remain silent and was inextricably intertwined with it. We therefore turn to the merits.

In *Doyle* v. *Ohio*, supra, the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. The court based its holding in two considerations: First, it noted that silence in the wake of *Miranda* warnings is "insolubly ambiguous" and consequently of little probative value. Second and more important, it observed that "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who

[9] The state attempts to characterize the defendant's decision to remain at the barracks to hear the evidence the police had against him as "a waiver" of his right to be silent. The defendant may have chosen, however, to remain at the barracks in the reasonable belief, based on the *Miranda* warnings he had received earlier, that he could invoke his right to be silent without incurring any penalties.

receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle* v. *Ohio*, supra, 617–19. The court recently reaffirmed *Doyle's* reasoning in *Wainwright* v. *Greenfield*, 474 U.S. 284, 290, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), in which it held that the defendant's silence following his arrest and receipt of *Miranda* warnings could not be used at trial to rebut his defense of insanity. The court reasoned: "The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity." Id., 292. Consistent with this rationale, the court has concluded that use at trial of silence *prior* to the receipt of *Miranda* warnings does not violate due process. *Fletcher* v. *Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982) (post-arrest silence); *Jenkins* v. *Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (pre-arrest silence); see *Wainwright* v. *Greenfield*, supra, 291 n.6.

Acknowledging that, unlike the defendants in *Doyle* and *Greenfield*, he was not under arrest when he invoked his right to remain silent, the defendant nonetheless advances two theories for the extension of *Doyle* to the facts of this case: Initially, he contends that, even though he was not formally under arrest at the Hartford barracks, he was in police custody. Alternatively, he argues that *Doyle* applies whenever *Miranda* warnings have been given regardless of an arrest or custody. We agree with the latter argument.

The record belies the defendant's claim that he was in custody after the search and seizure was completed.

Although the defendant was in custody when Bates drove him to the Hartford barracks for execution of the warrant, Bates testified that, when the search had been completed, he had made it clear to the defendant that he was free to go. The record discloses that, after the interview at the morgue the previous day, the police had promptly driven the defendant home. The defendant therefore had no reason to doubt the sincerity of Bates' offer of a ride from the Hartford barracks the following day.

We are nevertheless persuaded that the defendant's invocation of the right to be silent was not admissible. "*Doyle* and subsequent cases have . . . made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires." *Wainwright* v. *Greenfield*, supra, 291; see *Greer* v. *Miller*, 483 U.S. , 107 S. Ct. 3102, 3107-3108, 97 L. Ed. 2d 618 (1987). The unfairness of using a defendant's silence following *Miranda* warnings is not mitigated by the absence of custody. "*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances." *Wainwright* v. *Greenfield*, supra, 291; *Fletcher* v. *Weir*, supra, 606; *Anderson* v. *Charles*, 447 U.S. 404, 407-408, 100 S. Ct. 2180, 65 L. Ed. 2d 222, reh. denied, 448 U.S. 912, 101 S. Ct. 27, 65 L. Ed. 2d 1173 (1980). Custody is therefore not a prerequisite to a *Doyle* violation.[10]

[10] We have previously declined to resolve the question of whether *Doyle* applies to the use of a defendant's pre-arrest silence following receipt of *Miranda* warnings in *State* v. *Shashaty*, 205 Conn. 39, 529 A.2d 1308, cert. denied, U.S. , 108 S. Ct. 753, L. Ed. 2d (1987). The two other state courts that have considered this issue have arrived at opposite conclusions. In *State* v. *Robinson*, 496 A.2d 1067, 1072 (Me. 1985), the Supreme Judicial Court of Maine concluded that because the administra-

In this case, the police administered *Miranda* warnings to the defendant prior to taking him into custody to execute the search and seizure warrant. Nothing in the words or conduct of the police after the search had been completed indicated that the assurances implicit in the *Miranda* warnings were no longer in force. Under the circumstances, the defendant could have invoked his right to remain silent in the reasonable belief that the state would not thereafter use that silence against him. The record does not indicate that the defendant spoke during the police recitation except to invoke his rights to remain silent and to a lawyer. Thus, this is not a case in which the defendant was selectively silent. Cf. *Anderson* v. *Charles*, supra, 408; *State* v. *Casey*, 201 Conn. 174, 185–86, 513 A.2d 1183 (1986); *State* v. *Talton*, 197 Conn. 280, 295, 497 A.2d 35 (1985). In this context, use of the defendant's silence as affirmative proof at trial was "fundamentally unfair and a deprivation of due process." *Doyle* v. *Ohio*, supra, 618.[11]

Having concluded that admission of this portion of Bates' testimony was error, we next consider whether such error was harmful. When an error is of constitutional dimension, the state has the burden of proving it harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24–26, 87 S. Ct. 824, 17 L.

tion of *Miranda* warnings had been unnecessary under the circumstances, the warnings' prophylactic function would not be served were the defendant's silence held inadmissible at trial. In contrast, the Wisconsin Supreme Court reasoned that "[r]eceipt of the *Miranda* warning is the important factor in the *Doyle* analysis, not whether the defendant has been arrested. Therefore, the *Doyle* rationale protects post-*Miranda* silence whether occurring before or after arrest." *State* v. *Fencl*, 109 Wis. 2d 224, 234, 325 N.W. 2d 703 (1982). The Seventh Circuit recently affirmed the Wisconsin court's reading of *Doyle*. *Fencl* v. *Abrahamson*, 841 F.2d 760, 764–65 (7th Cir. 1988).

[11] The unfairness of the admission of the defendant's silence into evidence was compounded by the trial court's instruction to the jury. See footnote 12, infra.

Ed. 2d. 705, reh. denied, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967); *State* v. *Green*, 207 Conn. 1, 9, 540 A.2d 659 (1988). The state did not address this issue either in its brief or its argument to this court. From our review of the record, we conclude that the error was not harmless beyond a reasonable doubt. Since the state's case was based exclusively on circumstantial evidence, there was a "reasonable possibility" that the improperly admitted evidence of the defendant's silence in the face of police accusations contributed to his conviction. *State* v. *Hoeplinger*, 206 Conn. 278, 294, 537 A.2d 1010 (1988). A new trial is therefore in order.

Our conclusion that the defendant's silence at the Hartford barracks was inadmissible under *Doyle* is dispositive of the defendant's related claim that the trial court erred in instructing the jury that it could use that silence to infer the defendant's guilt.[12] Further, our holding renders it unnecessary to consider the defendant's alternate contention that admission of his statements and conduct at the barracks violated his rights

[12] The relevant portion of the court's charge provided: "Now, also there is another area that when the Defendant was at the Medical Examiner's Office, again it is for you to recall whether or not this, in effect, occurred. But the testimony of Trooper MacIntyre was that at some time during the stay at the Medical Examiner's Office, he told the Defendant that he thought he killed his wife. I gather, I guess that was made later at Police Headquarters in Hartford; again, it's for you to recall whether or not, in fact, there was any response by the Defendant. It is the state's position that there was not. That when these officers said that to the Defendant, he did not respond in any particular way audibly by saying something in response to those statements. Now, the statement made within an accused['s] hearing which are relevant and material to which he makes no reply may be given in evidence as indicative of conduct on his part when the circumstances show that he heard, understood, and comprehended the statement; and the facts are know[n] to him and he had an opportunity to speak and the circumstances naturally call for a reply from him." As we declined to review the defendant's *Doyle* claim regarding the interview with MacIntyre at the morgue, we do not address the propriety of this instruction to the extent that it refers to that interview.

under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

III

Because it is likely to arise at a new trial, we lastly address the defendant's claim that the court erred in excluding evidence of the defendant's willingness to take a lie detector test. We find no error in this ruling by the trial court.

The relevant testimony was the subject of a motion in limine by the state: MacIntyre testified out of the presence of the jury that, during the interview at the morgue, after he had accused the defendant of killing his wife, he had asked the defendant whether he would be willing to take a lie detector test. The defendant responded that he would do so after checking with his lawyer. In support of excluding this portion of testimony, the state argued that it had no probative value. In opposition, defense counsel argued that he intended to use the testimony to impeach MacIntyre's earlier statement that the defendant had become uncooperative at that point in the interview at issue. Over objection by the defendant, the court ruled that the evidence was inadmissible.

On appeal, the defendant renews his argument that this evidence was admissible. Although he did not do so at trial, he now couches his claim in constitutional terms: In essence, he argues that exclusion of this testimony impaired his right of confrontation as guaranteed by the sixth amendment, as it did not permit him to impeach MacIntyre's testimony that the defendant was disinclined to cooperate. We do not agree.

We have repeatedly observed that a "defendant's right to cross-examination 'is not absolute and is subject to reasonable limitation by the [trial] court.' " *State* v. *Milner*, 206 Conn. 512, 525, 539 A.2d 80 (1988); *State*

v. *Jones*, 205 Conn. 638, 670, 534 A.2d 1199 (1987); *State* v. *Thompson*, 191 Conn. 146, 148, 463 A.2d 611 (1983).The principal function of confrontation is " 'to secure for the opponent the opportunity of cross-examination.' " (Emphasis omitted.) *Davis* v. *Alaska*, 415 U.S. 308, 315–16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), quoting 5 J. Wigmore, Evidence (3d Ed. 1974) § 1395, p. 150. The constitutional standard is satisfied if defense counsel, through cross-examination is "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis* v. *Alaska*, supra, 318; *State* v. *Milner*, supra, 525; *State* v. *Weidenhof*, 205 Conn. 262, 271, 533 A.2d 545 (1987).

In this case, we agree with the state that, because of its minimal probative value, the defendant's willingness to take a polygraph test does not significantly implicate the reliability of MacIntyre's testimony. Due to their questionable accuracy, the results of a polygraph examination are not admissible either as positive proof or for the purposes of impeachment. *State* v. *Miller*, 202 Conn. 463, 485–86, 522 A.2d 249 (1987). In *State* v. *Carnegie*, 158 Conn. 264, 272, 259 A.2d 628, cert. denied, 396 U.S. 992, 90 S. Ct. 488, 24 L. Ed. 2d 455 (1969), we held that evidence of the defendant's willingness to take a polygraph test, which the defendant proffered to rehabilitate her credibility, was properly excluded because of the "almost complete lack of probative value [of such consent] and because of its self-serving character." That the defendant in this case sought to use the evidence for a different purpose than the defendant in *Carnegie* does not significantly augment the probative value of the testimony; nor is its admissibility mandated because the defendant here clothes his argument in constitutional terms. The trial court did not restrict defense counsel's cross-

examination of MacIntyre in any other respect. We conclude that the defendant's right of confrontation was not violated.[13]

There is error, the judgment is set aside and the case is remanded for a new trial in accordance with this opinion.

In this opinion the other justices concurred.

STATE OF CONNECTICUT
SUPREME COURT

NO. 12918

STATE OF CONNECTICUT

V.

GALEN PLOURDE : SEPTEMBER 20, 1988

ORDER

THE MOTION OF THE STATE OF CONNECTICUT, FILED AUGUST 9, 1988, FOR REARGUMENT AND/OR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

/s/ Carolyn Cunha Ziogas
ASSISTANT CLERK — APPELLATE

NOTICE SENT: SEPTEMBER 20, 1988
G. DOUGLAS NASH, A.P.D.
GALEN PLOURDE, PRO SE
TIMOTHY LISTON, A.S.A.
JUDITH ROSSI, D.A.S.A.
HON. JOHN M. BYRNE
MIDDLESEX, (CR9-64121)
REPORTER OF JUDICIAL DECISIONS

State of Connecticut

OFFICE FOR APPEALS

231 Capitol Avenue
Francis J. Drumm, Jr. Drawer Z, Station A Supreme Court
Chief Clerk Hartford, Connecticut 06106 Appellate Court

September 14, 1988

Judith Rossi, Esq.
Deputy Assistant State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492

Re: 12918 *State of Connecticut*
v.
Galen Plourde

Dear Attorney Rossi:

The Chief Justice has denied your request that she summon the full court for reargument of the *Plourde* matter.

Very truly yours,

/s/ Francis J. Drumm, Jr.
Francis J. Drumm, Jr.

cc: C. Douglas Nash,
Assistant Public Defender
Galen Plourde, pro se
Timothy Liston,
Assistant State's Attorney

Supreme Court, U.S.
FILED
DEC 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-834

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF CONNECTICUT, Petitioner

v.

GALEN PLOURDE, Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

G. DOUGLAS NASH
Assistant Public Defender
Chief Public Defender Office
121 Elm Street
New Haven, CT 06510
(203) 789-7477

December 19, 1988

QUESTION PRESENTED

1. Does the due process principle first enunciated in Doyle v. Ohio, 426 U.S. 610 (1976), bar the prosecution's use of the defendant's post-Miranda, pre-arrest silence where: (1) the defendant received Miranda warnings from police officers, read them, acknowledged that he understood them and expressly refused to waive those rights; (2) the defendant was continuously in the presence of the same police officers who gave the Miranda warnings and subsequently conducted the interrogation which produced the defendant's silence or its equivalent in the face of a direct accusation; (3) immediately prior to the interrogation, the police told the defendant he was free to leave thus ending a three hour period of police custody; (4) before returning the defendant to his home, the police officers asked if he would stay and talk with them, to which the defendant responded that "he would sit and listen and [the police] could talk"; and (5) the defendant never waived his right to remain silent or right to counsel?

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No. 88-834

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF CONNECTICUT, Petitioner

v.

GALEN PLOURDE, Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Galen Plourde respectfully requests the Court to deny the petition for a writ of certiorari, seeking review of the Connecticut Supreme Court's opinion. 1/ That opinion was decided on August 2, 1988, and is reported as State v. Plourde, 208 Conn. 455 (1988). 2/

STATUTORY PROVISIONS INVOLVED

The defendant was convicted of murder in violation of Conn. Gen. Stat. §53a-54a(a), which provides:

> A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

STATEMENT OF FACTS

The following corrections and additions to the facts

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1. All parties to the proceeding are named in the caption of this case.

2. Hereinafter, citation to the case is to the pages of the petitioner's appendix, Pet.App. at 1A-18A.

should be considered:

1. As stated by the petitioner and by the court, the State Police Detective Bates administered the Miranda warnings on the morning of December 18, 1983, and elicited the silence after a custodial search procedure which required the defendant to be transported from his home to the police troop barracks in Hartford. Pet. at 5A; Pet.App. at 10A. This sequence of events was accurate, but the time was not. Nor do these facts fully indicate the extent of the defendant's continuous custodial and "non-custodial" status which led up to his silence.

Two days before these events on the morning of December 16, 1983, the body of defendant's wife was found in her car which was parked in a lot behind a restaurant/cafe in the town of Cromwell. Pet.App. at 2A. She had left her home about 5:00 p.m. the previous night for a night out with a friend, and was last seen at about 11:00 p.m. Id. The defendant reported her failure to return home about 3:00 a.m. TH.43-44. 3/

The next day, the police drove the defendant from his home in the town of Berlin to the state morgue where he identified his wife's body. TI.125,147. He was eventually informed that the cause of death was by manual strangulation, and was later driven home by the same police. TM.67-68.

The following day, December 18, involved the specific events at issue. Detective Bates arrived at the defendant's Berlin home at about 4:00 in the afternoon, not in the morning. TO.90-92;Ex.104. He was armed with a search warrant for the defendant's person. Id. He explained his authority

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3. Citations for the individually paginated volumes of transcript are as follows: TH. - Transcript of 10/3/85; TI. - 10/4/85; TM. - 10/11/85; TO. - 10/17/85; TS. - 10/22/85; TT. - 10/23/85

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to the defendant and explained that he was being taken into custody for the duration of the procedures. TO.92. It was while they were at the house that Detective Bates advised the defendant of his Miranda rights from a preprinted form. TO.92-3. The defendant read the entire form, initialed all the spaces corresponding to the understanding of rights, but not the one on waiver. Pet.App. at 10A. He crossed out the word "waiver" and wrote in "understanding of rights." Id.

The defendant was driven first to Hartford Hospital for blood extraction, then to State Police Troop H Barracks in Hartford. TO.96-7. The search took about three hours. TO.98, 104, 113. It was about 7:17 on this winter night when the defendant was told he was free to go. TO.113-14. He was without an ability to get home to Berlin some twenty miles away, so they offered him a ride if he would wait. TO.114. They also asked if he would talk about the case; he "said that he would sit and listen and we could talk." Id; Pet.App. at 10A. Thereafter, the police detailed the evidence they had against him, accused him of killing his wife and asked him to give a statement. TO.115-18; Pet.App. at 10A-11A. It was in this context that the defendant's silence and his invocation of his right to counsel was elicited.

2. The petitioner states that the court concluded the Doyle violation was not harmless beyond a reasonable doubt. Pet. at 8. The conclusion was based on the court's own review of the record which it did despite the state's failure to "address this issue either in its brief or its argument to this court." Pet.App. at 14A-15A. The record reflected that evidence of the silence and the invocation of the right to counsel was admitted substantively to prove guilt. To make this clear to the jury, the state argued in its lead and rebuttal final arguments that this was proof of guilt. TS.29-

30,51. And the court charged the jury it could use the silence as proof of guilt. TT.33-5; Pet.App. at 14A n.11, 15A n.12. Moreover, the remainder of the evidence was entirely circumstantial and far from overwhelming. Pet.App. at 3A-7A. Respondent points this out to make it clear that this case does not involve the harmless error rule.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE DOYLE RATIONALE SUPPORTS THE RESPONDENT'S POSITION THAT ARREST AND/OR CUSTODY IS NOT A PREREQUISITE.

The essence of this claim, as in all Doyle claims, is the fundamental unfairness inherent in a situation where one arm of the government (the police) has assured a defendant that his silence will not be used against him while another arm of the government (the prosecution and/or the court) breaches that assurance and uses the silence at trial to convict or impeach him. Doyle v. Ohio, 426 U.S. 610, 619 (1976); Wainwright v. Greenfield, 474 U.S. 284, 291-92 (1986). The police assurances come from the warnings given pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and include warnings that the person has, for example, to remain silent and to stop answering questions and the right to counsel prior to questioning. Such assurances provide by implication that silence will carry no penalty. Doyle v. Ohio, 426 U.S. at 618. Trial use of this silence breaches these assurances and "affront[s] ... the fundamental fairness that the Due Process Clause requires." Wainwright v. Greenfield, at 291; See, Doyle v. Ohio, at 618. 4/ Similarly, comment on a defendant's invocation of his rights also violates due process and Doyle. It makes no more sense to penalize a person for

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4. A second reason for excluding silence is that it is an unreliable indicator of guilt. Silence is "insolubly ambiguous," for it may be nothing more than the exercise of Miranda rights. Doyle v. Ohio, at 617; State v. Morrill, 197 Conn. 507, 535 (1985).

exercising his rights than it does to penalize for silence. State v. Pellegrino, 194 Conn. 279, 289-93 (1984).

a. Application Of The Rationale By The State Court. These statements are no more than a reiteration of this Court's oft-stated rationale for the Doyle rule and its progeny. See e.g., Greer v. Miller, 483 U.S. ___, 107 S.Ct. 3102, 3107 (1987); Wainwright v. Greenfield, 474 U.S. at 291-92; South Dakota v. Neville, 459 U.S. 553, 565 (1983); Fletcher v. Weir, 455 U.S. 603, 606 (1982); Anderson v. Charles, 447 U.S. 404, 408-09 (1980); Jenkins v. Anderson, 447 U.S. 231, 239-40 (1980); Doyle v. Ohio, 426 U.S. 610, 619-20 (1976). This is the very rationale used by the Connecticut Supreme Court in reaching its decision. Pet.App. at 11A-12A.

b. The Petitioner-state Misstates And Misconstrues The Doyle Rationale. The petitioner-state does not dispute: that the police administered the Miranda warnings; that the defendant heard and understood the rights contained in those warnings; that the defendant refused to waive his rights to remain silent and to have counsel present; that the police who administered the warnings and heard his response were the same police who later questioned him; that the defendant was involuntarily taken from his home and placed in continuous police custody for three hours; that the elicitation of the silence was immediately after that custody while the defendant was still in the police barracks on a winter's night waiting for a ride home.

The petitioner's sole dispute is with the rationale of Doyle. 5/ It conceives the rationale to be this: Doyle is

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5. The petitioner intimates the additional argument that the defendant, after being given his Miranda warnings and assurances, was required to assert his silence to obtain the protections of Doyle. Pet. at 13A n.3. The argument is not fully asserted. Nor is there any support for such a proposition. In that such an argument may have been made, the respondent argues it should be summarily dismissed. Further,

no more than a prophylactic rule designed to increase the efficacy of another prophylactic rule, that of Miranda, and as such Doyle is inapplicable unless the suspect's status satisfies the prerequisites for the giving of the Miranda warnings and the waiver of those rights. Pet. at 10A. That is, unless the person is in custody and under interrogation there is no such thing as a right against self-incrimination or a right to counsel or a right to due process. Id.

This misstates the rationale of this Court. As noted above, Doyle is intended to prevent the fundamental unfairness of the state reneging on assurances it freely gave. Having told the defendant that his silence would not be used against him, Doyle prevents that promise from being breached. Nowhere in the petition is there an explanation of how this oft-stated rationale fits within the petitioner's position.

c. The Rationale Dictates That Neither Arrest Nor Custody Is A Prerequisite To A Doyle Violation. A lack of custody is no reason to breach the assurances of the Miranda warnings.

First, the underlying concern for fundamental fairness is not advanced by a custody requirement. For it is the Miranda warnings themselves which give the affirmative assurances -- that silence will carry no penalty -- that are reasonably relied upon by individuals. Wainwright v. Greenfield, 474 U.S. at 291. Neither the warnings nor the assurances change with the person's status. A free person who is accused is as apt to rely upon the Miranda warnings and his constitutional rights as one who is in custody. See, State v. Wilson, 199

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any argument that the defendant's statement that "'he would sit and listen and [the police] could talk'" indicates a waiver of the right to silence was summarily rejected by the state court and should be similarly treated by this Court. Pet. at 6A-7A. It is hard to imagine how a person who wished to remain silent could be more explicit in saying so.

Conn. 417, 444 (1986).

Second, lack of arrest or custody does not solve the inherent reliability problem. Doyle, at 617. A free person's silence is just as "insolubly ambiguous" as any other's for he too may be doing nothing more than exercising constitutional rights.

Third, such a legal distinction is unworkable. It would require a person to know when he is (and is not) in custody or under arrest and that the plain words and assurances of Miranda are false in one case and true in the other. The warnings may be word-for-word the same in both cases, but the layman is supposed to know better.

Fourth, permitting the police to deceive an individual about the future use of his silence at trial is not a public policy which should be promoted. Police should not have a license to lie on a matter so crucial to a person's freedom.

The defendant here was given the assurances from a police officer that his silence would not be used against him and was entitled to rely on this. This is not a question of whether the Miranda rights had to be given when they were. It is the fact that they were given and given repeatedly. Objectively, the giving of the warnings meant the defendant had become a focus, albeit an unclear one. Since this defendant was so advised of his rights and their assurances, it was violative of due process to permit his silence and invocation into evidence.

2. THE LACK OF CASE SUPPORT FOR THE PETITIONER-STATE'S POSITION.

The weakness of the petitioner-state's position is shown by the cases it relies upon. In sole support for the proposition that Doyle is inextricably bound to Miranda's

custodial interrogation requirement, [6] it quotes a passage from Judge Easterbrook's concurring opinion in Phelps v. Duckworth, 772 F.2d 1410, cert. denied, 474 U.S. 1011 (1985). Pet. at 10A. The case, and therefore the dicta in this concurring opinion, is inapposite for several reasons. Factually, this case involved post-arrest silence and legally was decided on the basis that the defendant "did not remain silent after his arrest and Miranda warnings but instead testified that he had at least twice told the police he did not commit these crimes and made further protestations of innocence. Id., 1412. The conclusion was that Doyle did not apply. The case's other holding was that the prosecutorial comment on the silence was harmless error. Id., 1413-16. Second, Judge Easterbrook's observations were based on the premise that the prosecutor's use of the silence for impeachment fell outside the Doyle proscription. Id., 1422. Here, the use of the silence was different; it was to substantively prove the defendant's guilt. Further, in making his comments Judge Easterbrook adheres to this Court's Doyle rationale that a violation is based upon the breach of the assurances given by police in Miranda warnings. His comments are only to point out that a prosecutor may impeach a defendant who chooses not to remain silent. Id. Third, the prevailing rule of law in the 7th circuit appears to support the respondent, not the petitioner. In Fencl v. Abrahamson, 841 F.2d 760, 764-65 (7th Cir. 1988), the court concluded that prearrest, post-Miranda silence is violative of Doyle.

The petitioner-state's attempt to utilize Colorado v. Connelly, 479 U.S. 157 (1986), is also misplaced. Pet. at 11A. Connelly involved an allegedly mentally diseased citizen

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6. All other cases cited therein concern application and waiver of the Miranda rights. Pet. at 10A. They do not involve a Doyle violation.

who walked up to a police officer and gave him an unsolicited confession to a murder. The conclusion that the citizen's act was voluntary and did not rely on any government action is inappropriate here where the police gave the Miranda assurances and the defendant relied upon them.

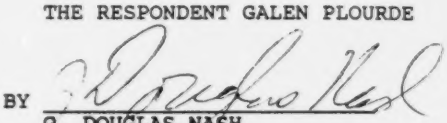
The petitioner's criticism that the state court misapplied the Wainwright v. Greenfield decision is erroneous. Pet. at 13A. While it is true that Greenfield did not hold that Doyle does not require arrest or custody, that was not the issue in the case, nor was it the proposition for which the state court cited it. The state court cited it for its recent expression of this Court's Doyle rationale. Pet.App. at 12A-13A. From the this Court's firmly placed "moorings," the state court did not cut itself loose. It applied the facts in a reasonable and logical way to protect a fundamental fairness.

Finally, the only case the state finds in support of its position is State v. Robinson, 496 A.2d 1067 (Me. 1985). Pet. at 14A. Admittedly, on this issue there are only this and the three cases cited at Pet. at 14A. But the presence of this one case does not present the significant type of conflict between courts of different jurisdictions which compel review by this Court.

CONCLUSION

In this case, Doyle v. Ohio was applied in a manner consistent with this court's decisions. For all of the foregoing reasons, the respondent respectfully requests this Court to deny the writ.

THE RESPONDENT GALEN PLOURDE

BY 

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